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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re JOHNNY MARTINEZ, on Habeas Corpus.	B165879 (Los Angeles County Super. Ct. No. BH001857)

APPEAL from an order of the Superior Court of Los Angeles County, David S. Wesley, Judge. Reversed.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Frances Grunder, Senior Assistant Attorney General, Julie I. Garland, Supervising Deputy Attorney General, and Michelle Des Jardins, Deputy Attorney General, for Defendants and Appellants.

Donald Specter and Keith Wattley for Plaintiff and Respondent.

I. INTRODUCTION

Former Governor Gray Davis and Warden Tom Carey of the California State Prison, Solano County appeal from an order granting the habeas corpus petition of Johnny Martinez, who is serving an indeterminate 17-year-to-life sentence for second degree murder and firearm use. (Pen. Code, §§ 187, 12022.5.) Former Governor Davis and Warden Carey contend the trial court should not have granted the habeas corpus petition and ordered Mr. Martinez released from prison on parole. We conclude that: the trial court acted beyond the allowable scope of judicial discretion in reweighing the factors former Governor Davis relied upon to reverse the grant of parole by the Board of Prison Terms (the board); former Governor Davis's decision to reverse the grant of parole by the board was supported by some evidence; and therefore the order issuing a writ of habeas corpus must be reversed.

II. BACKGROUND

A. Former Governor Davis's Decision

Acting pursuant to California Constitution, article V, section 8, and Penal Code section 3041.2, on October 4, 2001, former Governor Davis reversed the board's April 12, 2001, decision to parole Mr. Martinez. Among the grounds relied upon by former Governor Davis for reversing the parole decision were: Mr. Martinez's versions of the crime had varied greatly over the years thereby evidencing a lack of understanding

of the gravity of the murder and remorse; the circumstances of the attack upon the decedent, Jesus Granados[1]; Mr. Martinez's social history, which included extensive substance abuse and uncharged criminal conduct; Mr. Martinez carried out the crime in response to a fistfight which had already ended and did not involve him; the motive for the offense was trivial; there had been minimal participation in counseling; additional counseling was necessary before Mr. Martinez could be released on parole; and Mr. Martinez continued to pose a danger to public safety. Mr. Martinez filed a habeas corpus petition challenging former Governor Davis's reversal of the board's parole decision. On March 17, 2003, the trial court granted Mr. Martinez's habeas corpus petition. Former Governor Davis and Warden Carey have appealed.

II. THE APPLICABLE LAW

In the case of a life prisoner, the board must set a release date unless certain factors are present. Penal Code section 3041, subdivision (b) states, "The panel or board shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this

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[1] The decedent, Mr. Granados, had two brothers, Humberto and Jaime Granados. The two brothers were involved in the events leading up to the murder. Solely for purposes of clarity and not out of disrespect, Humberto and Jaime Granados will be referred to by their first names only.

meeting. . . ." The board is statutorily authorized to promulgate regulations concerning the release on parole of prisoners serving indeterminate terms. (Pen. Code, § 3052.) The parole board's guidelines applicable to murders committed after November 8, 1978, prohibit release if the prisoner poses an unreasonable risk of danger to society. California Code of Regulations, title 15, section 2402, subdivision (a) states: "General. The panel shall first determine whether the life prisoner is suitable for release on parole. Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison." Among the circumstances that must be considered are: the prisoner's social history; past and present mental state; past criminal history, including uncharged crimes that have been reliably documented; pre- and post-criminal behavior; and other relevant and reliable information that bears on the suitably for release. (Cal. Code Regs., tit. 15, § 2402, subd. (b).) A pattern of circumstances when considered alone may not "firmly establish unsuitability"; however, when those circumstances are taken together, they may warrant a denial of parole. (*Ibid*.)

Further, the board is to consider circumstances tending to show unsuitability for release including: the circumstances of the murder; the prisoner's prior record for violence; an unstable social history; sadistic sexual offenses; psychological factors; and institutional behavior. (Cal. Code Regs., tit. 15, § 2402, subd. (c).) In terms of the first factor, the circumstances of the murder, the board considers whether: multiple victims were attacked or killed in separate incidents; the offense was carried out in a dispassionate and calculated manner; the victim was abused, defiled, or mutilated; the

murder was carried out with an exceptional callous disregard for human suffering; the motive for the crime is inexplicable or trivial in relation to the murder. (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1)(A-E).) Further, the board considers circumstances tending to show suitability for release including: the absence of a juvenile record; a stable social history; signs of remorse; motivation to commit the crime; battered women's syndrome; a lack of criminal history; the prisoner's age when such reduces the probability of recidivism; whether the prisoner has realistic plans for release or has developed marketable skills; and institutional behavior. (Cal. Code Regs., tit. 15, § 2402, subd. (d).)

The California Supreme Court has held that the judicial branch has authority to review a Governor's executive decisions. That limited standard of review was described by the Supreme Court in the decision of *In re Rosenkrantz* (2002) 29 Cal.4th 616, 667, as follows: "[T]he core activities of all three branches of government may be subject to judicial review to determine whether they have a factual basis. [¶] . . . [J]udicial review of a Governor's parole decisions made pursuant to [California Constitution,] article V, section 8(b), to determine whether they are supported by some evidence related to the specified factors governing parole, does not usurp the inherent and primary authority of the executive branch over parole matters, does not materially impair such authority, and does not control a Governor's exercise of discretion. Any effect of judicial review upon the executive's parole decisions is merely incidental to the exercise of that function and therefore does not violate the separation of powers doctrine. Accordingly, we conclude that the courts properly can review a Governor's decisions whether to affirm, modify, or reverse parole decisions by the Board to determine whether they comply with due process

of law, and that such review properly can include a determination of whether the factual basis of such a decision is supported by some evidence in the record that was before the Board." Hence, we deferentially review former Governor Davis's decision for "'some evidence.'" (*Id*. at pp. 625-667, 670-675, 677-683; *In re Smith* (2003) 109 Cal.App.4th 489, 503-504; *In re Capistran* (2003) 107 Cal.App.4th 1299, 1305.)

In *Rosenkrantz*, the Supreme Court explained that the "some evidence" standard is "extremely deferential." (*In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 665; *In re Powell* (1988) 45 Cal.3d 894, 904.) The California Supreme Court further explained: "As the United States Supreme Court explained in a related context: 'Requiring a modicum of evidence to support a decision [to deny parole] will help to prevent arbitrary deprivations without threatening institutional interests or imposing undue administrative burdens. In a variety of contexts, the [United States Supreme] Court has recognized that a governmental decision resulting in the loss of an important liberty interest violates due process if the decision is not supported by any evidence. [Citations.]' (*Superintendent v. Hill* [(1985)] 472 U.S. 445, 455 [].) 'Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is *any* evidence in the record that could support the conclusion reached by [the Governor]. [Citations.]' (*Id.* at pp. 455-456 [], italics added.) [¶] Thus, the 'some evidence' standard is extremely deferential and reasonably cannot be compared to the standard of review involved in undertaking an independent assessment of the merits or in considering

whether substantial evidence supports the findings underlying a gubernatorial decision. . . ." (*In re Rosenkrantz*, *supra*, 29 Cal.4th at pp. 664-665.)

III. THE FACTS WHICH DEMONSTRATE SOME EVIDENCE SUPPORTS FORMER GOVERNOR DAVIS'S DECISION

A. Mr. Martinez's Changing Description of the Murder as Evidence of His Absence of Remorse and Understanding of the Gravity of the Murder

1. Factual background

a. the October 2, 1984, statement to the police

On October 2, 1984, Mr. Martinez was interviewed by two Los Angeles Police Department detectives. Mr. Martinez gave the following description of the murder of Mr. Granados. Jose Mora was present at Mr. Martinez's residence. Around 9 p.m., Mr. Mora and Mr. Martinez left the residence. They were going to walk to Mr. Martinez's grandmother's home. Mr. Mora saw Humberto. Mr. Mora "punched" Humberto in the face. Upon seeing the punching incident, Mr. Martinez walked into his grandmother's residence and got the murder weapon -- a Ruger .22 caliber rifle. Before Mr. Martinez secured the murder weapon, Mr. Mora stated he intended to steal "their" bicycle. In other words, Mr. Martinez secured the rifle in order to "scare them" as part of the armed robbery of a bicycle. When Mr. Mora was shown the rifle, he said, "[L]et's go find [Humberto] to scare him so he could leave us alone." They apparently then left the grandmother's residence. Mr. Martinez was carrying the rifle. Mr. Martinez claimed to have said to Mr. Mora, "'Let's turn back.'" But Mr. Martinez and Mr. Mora continued to

walk towards the others which included Mr. Granados. One of the youths accompanying Humberto then pushed Mr. Mora. Mr. Martinez pointed the gun. Mr. Martinez thought that the murder weapon was unloaded. Mr. Martinez told the police the murder weapon jammed. But Mr. Martinez then said that the murder weapon went off accidentally. Mr. Martinez's explanation differs materially from those provided by others interviewed by the detectives immediately after the murder including Fernando Llamas, Humberto, Jaime, and Mr. Mora.

b. the interview for the June 28, 1985, probation report

When interviewed by Deputy Probation Officer Gladys Nagy, Mr. Martinez claimed he had a "rather limited and spotty memory" of the murder. Ms. Nagy described Mr. Martinez's justification for the murder as "rambling, emotionally flat, and illogical." Mr. Martinez claimed, "'I got stabbed and fell on the ground and then I didn't know what happened.'" According to Mr. Martinez, Mr. Mora was "'all PCP'd out.'" Mr. Martinez told Mr. Mora not to go outside. Mr. Martinez stated Mr. Granados's brother threatened Mr. Mora. Mr. Mora struck Mr. Granados's brother. The fight arose as part of an effort by Mr. Mora to steal a little girl's bicycle. Mr. Martinez then saw Mr. Mora with the gun. Mr. Martinez claimed, "'I ran out and grabbed the gun and me and him started arguing.'" Mr. Martinez told Ms. Nagy, "'I did shoot him -- I didn't mean to.'" In other words, Mr. Martinez claimed to have disarmed Mr. Mora, who had possession of the rifle, and the murder weapon accidentally discharged.

c. the September 1985 interview

Mr. Martinez was interviewed in September 1985 by a staff psychologist with the California Youth Authority. Mr. Martinez said he was walking to his grandmother's house. A friend who was "on PCP" accompanied Mr. Martinez. Four "male adults" "jumped" Mr. Martinez's friend. Mr. Martinez was carrying the murder weapon with him in order to get it fixed. (Mr. Granados was murdered at 9:30 at night.) Mr. Martinez said a friend gave the rifle to him for hunting, but it was inoperable. He was pushed and the murder weapon "went off."

d. the August 24, 1988, interview

On August 24, 1988, Mr. Martinez was interviewed by Dr. Douglas A. Farr, a psychiatrist. Mr. Martinez stated: "[a] friend got into a fight with the victim"; the friend was "high on PCP"; Mr. Martinez was stabbed; he became angry because he was stabbed; he then pulled out the murder weapon "in order to warn people to stay away"; he was pushed from behind after being stabbed; and the murder weapon then accidentally discharged.

e. the November 1991 psychological valuation

During a psychological evaluation for the board in 1991, Mr. Martinez's recollection of the murder was described as follows: "[H]e had gone to his grandmother's home to pick up his birthday present, which was late in getting to him.

His friend, intoxicated on PCP, tagged along and was involved in a fight in front of his grandmother's house. The inmate stated his grandmother told him to 'take the 22 caliber rifle home'. He stated he took off the butt of the rifle at his grandmother's home and proceeded to put it down the front of his pants with 'part of the gun sticking out'. He stated the gun was loaded with the safety on. . . . He stated he began to walk home with his partner when friends of the fight victim chased the defendant and his partner until at some point, the defendant pulled out the rifle and told the attackers to leave them alone. The defendant states one of the assailants had a knife and that he was 'almost stabbed' or 'hit', but he moved away. The victim threatened to kill him at this point, the inmate stated, and he fired the rifle. The defendant stated he didn't pull the trigger, but as he was re-enacting the crime in the interview office and was holding the gun, he automatically flicked off the safety and pulled the trigger as he talked about his fear of getting stabbed. . . ."

f. Mr. Martinez's story in 2000

In 2000, Mr. Martinez's version of the incident as related to a psychologist was as follows: "He had apparently discouraged his friend (ostensibly high on PCP) to accompany him, but failed and his friend ended up in a fight which ended temporarily but during which the inmate retrieved a gun from his grandmother's house. He then caught up with this unaccompanied friend and they were then 'jumped.' He got up, panicked and pulled the trigger. He then went home because he was scared that he would be killed

(he saw an assailant with a knife). He had had the gun 6 months and never previously shot it. He stated that there were bullets in [it] when he bought it. He stated that his uncle had taught him how to clean and take apart the gun and that there was nothing wrong with it (versus apparent earlier claims of gun malfunctioning). . . ."

g. professional evaluations of Mr. Martinez's different stories

Over the years, those interviewing Mr. Martinez have evaluated the nature of his differing explanations for the murder. The deputy probation officer described Mr. Martinez's description of the murder as "rambling, emotionally flat, and illogical." Mr. Martinez described his recollection of the murder to Ms. Nagy, the deputy probation officer as "rather limited and spotty." In 1996, a psychologist described Mr. Martinez's varying stories as follows: "Throughout the years, the inmate has given different versions of details of this crime. . . . Therefore, even up to the present time, it appears that Martinez still has some difficulty in giving a consistent and credible account of the events of the crime." In 1996, Mr. Martinez stated he did not know why the crime occurred. In 1998, a psychologist remarked, "His accounting of his motivation and even of the physical realities of the act is hopelessly shifting and vague." In 1999, a psychologist noted, "The inmate continues to have a fuzzy and shifting image of exactly how he came to fire the fatal shot some 15 years ago. . . ."

h. 1996 professional evaluations of Mr. Martinez's remorse

In 1996, Mr. Martinez was evaluated by three psychologists, Dr. Lance A. Portnoff, Dr. L. W. Berning, and Dr. Steven C. Moberg. They concluded: "With regard to remorse, his attitude suggests continued debasement of the victim. He was asked the victim's name and admitted he did not know it. His only statement is that, 'It doesn't matter how much time I do, I can never bring him back to life.' This statement seems to suggest that he feels he should be released because further punishment will not produce tangible benefit for the deceased victim. When asked how he thought the victim might have felt, he replied, 'Hurt real bad.' He was asked how he felt after the commission of the murder. He stated that his thought was to 'get out of town real quick.' Therefore, it appears that Mr. Martinez has remorse at the level of wishing he had not gotten caught."

2. Legal analysis

The forgoing constitutes "some evidence" that Mr. Martinez lacks an understanding of the magnitude of his offense and is remorseless. There is no question that Mr. Martinez has changed his story repeatedly. Sometimes Mr. Martinez has claimed he cannot recall what happened. On other occasions, he has described the murder in sharp detail. None of his conflicting stories are consistent with the statements of others who saw the murder actually occur. In an effort to justify the murder, Mr. Martinez has repeatedly falsely claimed he was stabbed, but the police reports indicate nothing of the sort ever occurred. On another occasion, Mr. Martinez claimed he

was "'almost stabbed.'" Sometimes Mr. Martinez has claimed he was shoved from behind thereby causing the murder weapon to discharge, but on other occasions failed to mention the purported shoving incident. On one occasion, in yet another effort to minimize his criminality, Mr. Martinez claimed he was taking the murder weapon in the middle of the night to have the rifle repaired, but later said he knew it was operable. In another minimization effort, Mr. Martinez claimed to have taken the murder weapon from Mr. Mora when it accidentally discharged. These are but a few of the facts which constitute some evidence that Mr. Martinez is unsuitable for release because his conflicting explanations of what occurred are evidence of a lack of remorse.

Mr. Martinez does not dispute that he has given sharply conflicting statements about the murder. Nor does Mr. Martinez dispute that falsification and minimization are factors indicative of a lack of remorse.

Mr. Martinez argues that he in fact has accepted responsibility for the murder. Mr. Martinez points to: statements made at parole hearings during which he acknowledged responsibility; statements in an April 2000 Department of Corrections evaluation that Mr. Martinez was remorseful; a characterization by Mr. Martinez in 1988 that he needed to be imprisoned because he was a threat to society; a board assessment that Mr. Martinez appeared to be remorseful in 1995 during a parole hearing; and a 1991 evaluation that Mr. Martinez was capable of understanding the seriousness of his crime. Mr. Martinez is correct that there is evidence in the record that he was remorseful. On the other hand, there is evidence that Mr. Martinez was not remorseful. The trial court relied upon the evidence that Mr. Martinez was remorseful.

No doubt, we conduct independent review of the trial court's issuance of a writ of habeas corpus when it is based solely on written documents as is the case here. (*In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 677; see *In re Serrano* (1995) 10 Cal.4th 447, 457.) But neither we nor the trial court are authorized to undertake an independent examination of the record; our review is "extremely deferential" and we look only to see if "some evidence" supports former Governor Davis's decision to reverse the board's decision to parole Mr. Martinez. (*In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 665.) The record is in conflict on the question of Mr. Martinez's remorse. Hence, there is no merit to Mr. Martinez's argument that there is evidence of remorse in the record and such requires that a court set aside former Governor Davis's reversal of the parole determination. There is "some evidence" of an absence of remorse; therefore, former Governor Davis's absence of remorse finding must be upheld and the different conclusion of the trial court reversed. (Cf. *In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 680 [in the absence of evidence of lies concerning the offense by the prisoner or minimization efforts, former Governor Davis's no remorse finding was improper].) The presence of remorse evidence does not permit former Governor Davis's decision to be set aside in this case.

B. The Circumstances Of The Offense

Former Governor Davis relied upon the circumstances of the offense in reversing the board's decision. There is "some evidence" that the homicide in this case was aggravated for a second-degree murder. (See *In re Rosenkrantz*, *supra*, 29 Cal.4th at

p. 689 (conc. opn. of Moreno, J.).) To begin with, the initial investigation of the Los Angeles Police Department indicated that Mr. Mora punched Humberto in the face. Mr. Martinez then secured the murder weapon, a rifle. There was evidence that Mr. Martinez concealed the rifle in his pants. This included evidence Mr. Martinez removed the stock of the murder weapon in order to conceal the rifle. Mr. Martinez then shot Mr. Granados who was unarmed. Mr. Martinez had no quarrel with Mr. Granados or the others. Further, the motive for the crime is inexplicable, trivial in relation to the offense, and completely without justification. (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1)(E).) Even Mr. Martinez was unable to ever explain why Mr. Granados was murdered. There is some evidence of premeditation, which would support a first-degree murder verdict. (*People v. Miller* (1990) 50 Cal.3d 954, 993 [taking a weapon to kill an unarmed victim coupled with the absence of provocation]; *People v. Miranda* (1987) 44 Cal.3d 57, 87, disapproved on another point in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4 [bringing a loaded gun to a crime scene and shortly thereafter killing an unarmed victim].) In *Rosenkrantz*, the Supreme Court noted that when a jury returned a second degree murder verdict, the Governor was not precluded from relying on other circumstances which were indicative of premeditation or deliberation. (*In re Rosenkrantz*, *supra*, 29 Cal.4th at pp. 678-679.) In the present case, Mr. Martinez was permitted to plead guilty to second degree murder. But that does not bar former Governor Davis from considering other factors which would demonstrate the present homicide was more aggravated than other second degree murders. Further, Mr. Martinez secured the murder weapon because an effort was to be made to steal a young girl's

bicycle; i.e., commit an armed robbery. There is some evidence to support former Governor Davis's conclusion that the present murder was a crime carried out in a dispassionate and calculated manner.

C. Mr. Martinez's Social History

Mr. Martinez's social history was relied upon by former Governor Davis in denying parole. Mr. Martinez had no prior criminal convictions or adjudications at the time Mr. Granados was murdered. But Mr. Martinez stated that he routinely committed thefts. During a Board of Prison Terms hearing, Mr. Martinez admitted that he had committed at least 20 thefts. During his probation interview with Ms. Nagy, Mr. Martinez indicated that he secured the rifle after being advised that an effort was going to be made to steal a bicycle from a young girl. Further, Mr. Martinez, who was 18 years of age when Mr. Granados was murdered, admitted drinking up to one gallon of wine per day. Mr. Martinez's drinking was so intense that he experienced "blackouts periodically." Mr. Martinez admitted stealing so that he could obtain money for alcohol. Mr. Martinez indicated he smoked marijuana "'once or twice a day.'" As late as 1996, three Department of Corrections psychologists who had extensively interviewed Mr. Martinez concluded, "[D]rugs and alcohol played an indirect part in the commitment offense in that they were a part of an unstable, antisocial lifestyle which included like-minded criminal associates who were also alcohol/drug abusers. At the present time, the inmate does not appear to have any grasp of abstinence principals in spite of his

attendance at A.A. . . .” Since 1996, Mr. Martinez had not been attending the Alcoholics Anonymous meetings. In fact, in a March 16, 2001, psychosocial evaluation for the Board of Prison Terms, Dr. Charles Taylor indicated that as of 1996, there was no evidence Mr. Martinez benefited from participation in self-help programs. Additionally, Mr. Martinez associated with Mr. Mora. According to Humberto, Mr. Mora was involved in a violent attack with bricks, sticks, and “different kinds of weapons” two months prior to the murder of Mr. Granados. We agree with the analysis of the Attorney General concerning Mr. Martinez, “This social history paints a picture of an alcoholic man with little regard for the law or the truth, who associated with thugs.”

On appeal, Mr. Martinez, as did the trial court, cites to a series of facts which indicate he is not currently dangerous. However, Mr. Martinez’s arguments ignore that there is some evidence in terms of his social history that provides a logical basis for concluding he is not suitable to release on parole. As noted previously, neither we nor the trial court are permitted to reweigh the evidentiary record which contains some evidence that Mr. Martinez’s social history involves repeated drug and alcohol involvement as a motive for criminal conduct including the present offense which resulted in the death of an unarmed individual.

D. Other Issues

The parties raise other issues that warrant brief comment. First, Mr. Martinez contends the Governor failed to consider certain enumerated factors relevant to parole

suitability. This contention was not raised in the trial court and has been waived. (*In re Wells* (1967) 67 Cal.2d 873, 875; see 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Writs, § 20, pp. 540-541.) Nonetheless, there is no evidence former Governor Davis failed to consider mitigating factors. Second, Mr. Martinez argues that former Governor Davis has an anti-parole policy which violates federal and state constitutional due process protections. This contention has no merit. (*In re Rosenkrantz*, *supra*, 29 Cal.4th at pp. 683-685.) The only "new" evidence offered by Mr. Martinez is a continuation of the pattern discussion in *Rosenkrantz.* Third, Mr. Martinez argues that his ex post facto rights have been violated by the 1988 adoption of California Constitution, article V, section 8. This contention is without merit. (*In re Rosenkrantz*, *supra*, 29 Cal.4th at pp. 636-652.)

Finally, we need not address other adverse facts as to Mr. Martinez including the presence of some evidence of the apparent gang related nature of the murder. The murder arose from a confrontation between two groups of youths. Both Mr. Mora and Humberto had recently been involved in a similar confrontation albeit only bricks and bats were used, no firearms. Mr. Martinez, when arrested, gave the gang moniker of "Puppet." Also, we need not address the effect of Correctional Counselor G. R. McNeil's May 1, 2000, assessment that Mr. Martinez presented a low to moderate degree of threat to the public.

IV. DISPOSITION

The order granting the habeas corpus petition is reversed. The trial court is to enter a new order denying the habeas corpus petition. The petition for writ of supersedeas, filed March 27, 2003, is denied as moot. The amended temporary stay order of March 28, 2003, remains in full force and effect until the issuance and filing of this court's remittitur.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

I concur:

GRIGNON, J.

Armstrong J.

I respectfully dissent.

I would affirm the trial court's order granting Mr. Martinez's petition for a writ of habeas corpus.

The Governor believes that petitioner "continues to pose a danger to public safety at this time." In so finding, the Governor relied on the "facts" set out in his report: Petitioner committed a grave murder, has not taken responsibility for that crime, lacks remorse, requires additional anger and stress management counseling, has received no tangible benefits from the anger and stress management counseling he has had, and has a social history which includes petty thefts and alcohol and drug abuse.

In my view, these findings are devoid of a factual basis. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 658.) To the contrary, the evidence is that petitioner *has* taken responsibility for his crime and *has* shown remorse. He never denied the shooting, but, according to the probation report, "voluntarily acknowledged wrongdoing at an early stage of the criminal process." He pled guilty to second degree murder. He told prison doctors that he felt guilty about the murder, had nightmares about it, and believed that he did not have the right to take another's life. He said as much again at the parole hearing: "Even out of fear or panic, I had no right to take a life, and I did." He also said that he still dreamt about the crime and that "I feel real bad because two families suffered, the victim's family and my family. No matter what I do, what I say, I can never bring that person back." A 1998 panel of prison psychologists found that he had insight into the crime and showed remorse for the victim.

The Governor found that petitioner's "continued evasion of responsibility for his actions indicates that he does not feel remorse," citing the fact that his accounts of the crime have varied greatly over the years. It is true that a prison psychologist reported that petitioner has fuzzy and shifting image of exactly how he came to fire the fatal shot, but I do not see how this logically supports a finding of lack of responsibility or lack of remorse. Rather, I see in the changing versions evidence of a tortured sense of guilt.

The Governor's finding that petitioner had received no tangible benefits from anger management or stress management counseling can only be based on a mis-reading of the record. The reference to "no tangible benefits" immediately follows a statement about petitioner's completion of 15 *psychotherapy* sessions in 1995. The authors of the report concluded that "[i]t appears that this inmate has received no tangible benefits from psychotherapy, especially considering his degree of insight into the underlying causes of his commitment offense." The sentence can only mean that petitioner did not need psychotherapy because he understood the underlying causes of his offense.

Lack of criminal history is a circumstance tending to show suitability for parole. (Cal. Code Regs., tit. 15, § 2402, subd. (d)(6).) It is defined as "The prisoner lacks any significant history of violent crime." Petitioner's self-confessed criminal history involves petty thefts committed as a juvenile. These offenses did not involve violence and did not result in a criminal record. He has not committed any criminal acts in the 20 years he has been imprisoned. Thus, rather than being a circumstance supporting denial of parole, criminal history is a circumstance showing suitability for parole.

Similarly, petitioner's history of substance abuse is the history of an 16 year old who occasionally used marijuana or drank excessive amounts of wine, not a history of adult substance abuse or addiction. Moreover, "a prisoner's prior addiction is not an appropriate consideration in determining parole suitability." (*In re Smith* (2003) 109 Cal.App.4th 489, 505.)

Petitioner's excellent institutional history indicates that he presents a very low risk of future violence. He has no record of violence while imprisoned and participated in institutional activities that indicate an enhanced ability to function within the law on release. "[A]lthough the state expects prisoners to behave well in prison, the absence of serious misconduct in prison and participation in institutional activities that indicate an enhanced ability to function within the law upon release are factors that must considered on an individual basis by the Governor in determining parole suitability. (Cal. Code Regs., tit. 15, § 2402, subds. (c), (d); [citation omitted]." (*In re Rosenkrantz, supra,* 29 Cal. 4th at p. 682.)

Nor can I agree that this was a "grave" murder as that term is used in the law. All murders are grave, but only murders which are committed in an especially heinous, atrocious or cruel manner (for example, an execution-style murder or a murder carried out in a manner which demonstrates an exceptionally callous disregard for human suffering) may prevent the grant of parole. (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1).) This was not such a case. Instead, the circumstances of this offense were no more aggravated or violent than the minimum necessary to sustain a conviction for second degree murder, and, as a sad commentary, are little different from other murders arising on the streets of Los Angeles as a result of confrontations between groups of young men.

Article V, section 8(b) of the California Constitution mandates that the Governor may consider only the factors that may be considered by the Board. (*In re Rosenkranz, supra,* 29 Cal. 4th at p. 663.) One of those factors is whether the prisoner will pose an "*unreasonable* risk of danger to society or a threat to public safety if released from prison." (Cal. Code Regs., tit. 15, § 2401, subd. (a).) By granting parole only to those prisoners who do not pose an unreasonable risk to society, the regulation recognizes that there will always be some risk associated with the release of even a deserving prisoner. Some risk or a low degree of risk or a moderate degree of risk is substantially less danger than an unreasonable risk. Here, the Governor failed to make a finding that petitioner posed an unreasonable risk of danger if released on parole.

After reviewing all the information received from the public, petitioner's record in prison, and the circumstances of the crime, the Board concluded "that the prisoner is suitable for parole and would not pose an unreasonable risk of danger to society or a threat to public safety if released from prison."

In my view, this record establishes only that petitioner has repeatedly acknowledged his responsibility for the victim's death and expressed remorse. During his 20 years in prison, has been free of alcohol and drugs, and has not committed a single act of violence. He has been a model prisoner. He has a job waiting for him and would live with relatives on his release. Prison psychologists and counselors are unanimously of the

opinion that he poses a very low risk of violence or threat of danger to the public. I would thus affirm the trial court's order.

ARMSTRONG, J.